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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 484

THE MANUFACTURERS LIGHT AND HEAT COMPANY,
THE OHIO FUEL GAS COMPANY,

Petitioners,

v.

TEXAS EASTERN TRANSMISSION CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 19, 1962.

CITATIONS TO OPINION BELOW

The letter order of the Commission is reported at 25 FPC 955 and is printed in Appendix B hereto and the order denying rehearing at 25 FPC 954 and is printed in Appendix B hereto. The opinion of the Court of Appeals is reported at 306 F. 2d 345 and is printed in Appendix B hereto. The order of the Court of Appeals denying rehearing is printed in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1962. Rehearing was denied on April 22, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

(1) Whether in the interest of effective administration of the Natural Gas Act, a Court should substitute its judgment for that of the Commission in the detailed interpretation of the Commission's own order defining a natural gas company's obligations under a rate settlement which itself was approved by the Commission, and which further was dependent upon the outcome of other administrative proceedings pending before the Commission.

(2) Whether the disputed provisions of a rate settlement as approved by the Federal Power Commission should be interpreted in the light of the interest of the ultimate consumer in accordance with the underlying provisions of the Natural Gas Act, or whether they should be interpreted solely upon a technical interpretation of the intent of the literal provisions of such settlement agreement.

(3) Whether it was error for the Court below to substitute its judgment for that of the Federal Power Commission in construing the meaning and intent of its own Order Approving a Settlement Agreement between a natural gas company and its customers thereby relieving the natural gas company of the legal obligation to refund any more than the $385,569 although the natural gas company, in connection with the same settlement, voluntarily tendered to the same customers in the same proceeding the sum of $3,862,572 and has paid to all of them except

the Petitioners, a total of $2,811,501 and where the Federal Power Commission has held that such tender and payment does not fully comply with the natural gas company's obligation under the order approving said settlement agreement.

STATUTE INVOLVED

The statutory provisions involved are Sections 4 and 5 of the Natural Gas Act, 52 Stat. 822; 70 Stat. 72 and 52 Stat. 823, 15 USC 717 c and d. They are printed in Appendix A *infra*.

STATEMENT

The Court below reversed an order of the Federal Power Commission interpreting and applying the meaning and intent of a settlement agreement previously considered and approved by the Commission between the Respondent, Texas Eastern, a natural gas company under the Natural Gas Act (15 USC 717) and certain of its wholesale gas customers including Petitioners, the Columbia Companies.

The present dispute involves only one clause of the Commission's Order Approving the Settlement Agreement. That clause required Texas Eastern to pass on, by reduction in its own rates, certain prospective savings in cost of gas purchased which Texas Eastern might realize as the result of the final disposition of certain Federal Power Commission rate proceedings of one of Texas Eastern's suppliers, United Gas Pipe Line Company.

The rate reduction condition was contained in Finding 2(ii) of the Commission's Order Approving the Texas Eastern settlement. The portion of that condition pertinent to this proceeding is as follows:

> "If . . . United Gas Pipe Line Company, as a result of a final judgment in Docket No. G-2019, . . . place in effect tariffs providing for lower sales rates to Texas Eastern than are currently in effect as of such date, . . . then Texas Eastern shall file a reduction in the commodity charge of its rates in Rate Zones C and D which will as nearly as possible be equal to the . . . reduction in rates charged Texas Eastern by United Gas . . . If Texas Eastern is required to make a reduction in its rates pursuant to this agreement, such reduction, to the extent that it became necessary as a result of a final judgment in Docket No. G-2019 shall be made effective as of the date of such final judgment . . . ." (R. 63)

As will be more fully explained, Texas Eastern formally tendered to its customers, $3,865,572 in settlement of the dispute over its obligation under Finding 2(ii). The Commission held that this amount did not fully satisfy the obligation under Finding 2(ii), but the Court, applying a legalistic interpretation developed by Texas Eastern at a late stage in these lengthy proceedings, limited Texas Eastern's legal obligation under Finding 2(ii) to $385,569 plus possible minor interest charges.

Since Finding 2(ii), *supra*, by its terms referred only to the outcome of United's Docket No. G-2019, the nature and disposition of that proceeding is not only of obvious significance, but is the key to the ultimate issue in this matter.

United's Proceedings at Docket No. G-2019

United, at the time Texas Eastern's settlement was approved, was embroiled in a series of rate cases then pending before the Commission. Two of these pertained to sales to Texas Eastern, viz., Docket Nos. G-1142 and G-2019. Docket G-1142 was a rate investigation initiated by the

Commission on October 12, 1948 pursuant to Section 5(a) of the Natural Gas Act (15 U. S. C. 717d). Docket G-2019 was a rate increase filed pursuant to Section 4 of the Natural Gas Act (15 U. S. C. 717c), by United on July 3, 1952 involving also a "conversion" by United from preexisting separate agreements with its customers to standard contracts applicable to general classifications of service to be offered by United (R. 142-145). By order of November 26, 1952 (R. 150-55), the Commission consolidated Dockets G-1142 and G-2019 with two other rate proceedings of United (not pertinent to these proceedings) for purposes of hearing. Thereafter, Dockets G-1142 and G-2019 were treated by the Commission as one.

Specifically, United in the proceedings at Docket G-2019 sought to establish new (or conversion) classifications of service for deliveries to Texas Eastern (among others) at Longview, Texas, and at the same time to increase existing rates for these deliveries. United also sought to establish a new (or conversion) classification of service for deliveries to Texas Eastern at Kosciusko, Mississippi, but sought no change in the existing rate for deliveries at that point (R. 143-145; See also Opinion 277, 13 FPC 398.)

Opinion 277

With the sole exception of Mississippi River Fuel Corporation, all of United's customers, including Texas Eastern, entered into a settlement agreement as to the consolidated proceedings involving United's rates at Docket No. G-2019, *et al.* That settlement agreement was approved and United's rates, to be effective August 1, 1954, were fixed accordingly by the Commission's Opinion 277, issued November 2, 1954 (13 FPC 398).

Despite Mississippi River Fuel Corporation's position, United placed into effect as of August 1, 1954, the new rates

ordered by Opinion 277. The net effect of these new rates was a reduction in cost of gas purchased by Texas Eastern from United amounting to $1,296,200 for the year ended August 31, 1955 (R. 68) plus a refund of $385,569 for gas purchased from United prior to August 1, 1954.

The Separate Proceedings in Docket Nos. G-2019, et al. With Respect to Mississippi River Fuel Corporation

Hearings as to the issue of proper rates to be charged Mississippi were held, culminating in the Commission's order (14 FPC 353 (1955)) which was appealed by Mississippi, reversed in part in *Mississippi River Fuel Corporation* v. *F. P. C.*, 252 F.2d 619 (D. C. Cir. 1957), Cert. den. 355 U. S. 904, and remanded to the Commission for further proceedings. Upon remand, a settlement was reached and on September 11, 1958, the Commission issued an order terminating the proceedings at Docket Nos. G-2019, 1142, *et al.* (R. 193).

The Docket Nos. G-2019, et al. Proceedings in Perspective

Several aspects of the Docket G-2019, *et al.* proceedings are particularly significant to the issue of Texas Eastern's obligations under Finding 2(iii):

(a) Having agreed to the settlement in United's rate proceedings at Docket G-2019, *et al.*, which resulted in Opinion 277, Texas Eastern precluded itself from any further objection or appeal from Opinion 277. Therefore, as to Texas Eastern, Opinion 277 was a final judgment in the Docket G-2019, *et al.* proceedings subject only to the disposition of the contentions of Mississippi River Fuel Corporation, the sole dissenter to the Opinion 277 settlement.

(b) The further proceedings in the Docket G-2019, *et al.* proceedings at Mississippi's behest resulted in no

change whatever in the application of Opinion 277 to Texas Eastern.

(c) Texas Eastern actually received from United the full benefit of the Opinion 277 refunds and rate reductions from and after August 1, 1944—four full years before the Mississippi River Fuel appeal in the Docket G-2019, *et al.* proceeding was finally concluded and the proceedings closed.

(d) Finally, and more important, Opinion 277 approved a package settlement of all of United's consolidated rate cases, under Sections 4 and 5 of the Act. Nothing in the settlement or in Opinion 277 recognized or relied on the jurisdictional distinctions between Dockets G-1143 (Section 5a) and G-2019 (Section 4e). On the contrary, the restructuring of United's rates, which resulted from Opinion 277, reflects quite clearly that the prescribed rate changes both at Kosciusko and Longview were not related to or limited by consideration as to what Docket or Section of the Natural Gas Act was involved.

In short, it is futile to apply the Court's distinctions to a settlement order such as Opinion 277. Settlements are pragmatic in the main. The substitution by the Court of its judgment for that of the Commission's in interpreting the impact of the United settlement illustrates the serious hindrance to the effective administration of the Natural Gas Act which is imposed by the decision of the Court below.

Texas Eastern's Position Following the Issuance of Opinion 277

By letter dated February 23, 1955 (R. ~~2117~~ 162-166), Texas Eastern advised the Commission that based upon advice of counsel, it "will make no refunds to customers, nor

reduce filed rates, until such time as a final judgment is rendered in Docket G-2019."

In substance, Texas Eastern advised the Commission that on the advice of its counsel, which was accompanied with typical disclaimers of admission of legal liability, it would impound the *net difference* in cost of gas purchased from United under the Opinion 277 rates and those rates in effect prior to Opinion 277 (R. 165). Texas Eastern explained that its only reason for not making immediate rate reductions to reflect this cost saving was the uncertainty involved in the outcome of the Docket G-2019, *et al.* proceedings related to Mississippi River Fuel Corporation (R. 174).

The matter was pursued in further correspondence and conferences between the Commission and Texas Eastern (R. 167-168; R. 169; R. 170; R. 171; R. 172 and R. 173-176). As to its intention regarding the impounded fund, Texas Eastern stated on July 8, 1955:

> "At such conference the Company representatives emphasized that it had every intention of complying with the above cited Finding 2(ii); and would comply with the same as soon as practicable after the Order became final in Docket G-2019. The Company sought to make it entirely clear that it had no quarrel with the requirements of Finding 2(ii), and that its only area of disagreement with the Commission was as to the time when the Company should be required to take action." (R. 174)

Throughout this exchange, Texas Eastern made no reference to the amount of its liability under Finding 2(ii). However, the conclusion is inescapable that the total amount Texas Eastern was impounding was, implicitly, if not explicitly, understood to be the measure of this liability —subject only to being changed as a result of the Missis-

sippi River Fuel Corporation appeal in the consolidated proceedings at Docket G-2019, *et al.*

If anything is needed to establish that this was Texas Eastern's understanding; it is necessary only to refer to Texas Eastern's Petition, filed October 14, 1955, to amend Finding 2(ii). By its own statement in that Petition, Texas Eastern specifically recognized its obligation under Finding 2(ii) to make rate reductions reflecting the *net savings* in total cost of gas purchased from United resulting from United's reduction in its rates pursuant to Opinion 277, as follows:

> ". . . Texas Eastern has deferred reflecting said *net decrease* pursuant to the provisions of Finding 2(ii) but has impounded said *net difference* in a reserve fund which is being held for distribution upon final conclusion of any review proceedings which Mississippi River Fuel Corporation may institute in Docket G-2019." (R. 68) (Emphasis added)

Texas Eastern's Petition, however, requested authority to "set off" a subsequent rate increase filed by United as of September 30, 1955, against Texas Eastern's rate reduction obligation under Finding 2(ii) as above described. The motion also sought to limit the Finding 2(ii) obligation only to the period from August 1, 1954 to the effective date of United's September 30, 1955 filing.

This Petition exposes Texas Eastern's true motivation in the subsequent evolution of this case. This motivation was to obtain a "set off" against subsequent rate filings made by United which increased Texas Eastern's cost of of gas purchased, but to do this without requiring Texas Eastern to file a new rate proceeding under Section 4 of the Natural Gas Act which would, of course, bring into issue Texas Eastern's entire cost of service. The first of United's rate increases was that filed by United on September 30,

1955 and which became effective April 1, 1956. Subsequent rate increases of United became effective November 15, 1956 and December 1, 1957"

> "which increases resulted in a rate level as of September 11, 1958, approximately $5.7 million per annum *higher* than the level of United's rates to Texas Eastern at the time of the issuance of the Order of October 9, 1953, in Docket No. G-1964." (R. 90).

During this entire period Texas Eastern's Docket G-1964 rates (filed May 1, 1952) were in effect until lawfully superseded by the subsequent Texas Eastern rate filing which became effective on November 10, 1957. Thus, to the extent that Texas Eastern could change the existing understanding of Finding 2(ii) it could "set off" part or all of the United rate increases which Texas Eastern had not sought to recoup by a rate filing of its own.

Texas Eastern's Changed Position on Finding 2(ii).

In correspondence addressed to the Commission under date of October 6, 1958 (R. 77-84), Texas Eastern *for the first time*, five years after the event, and with the 20-20 acuity of hindsight, advised the Commission:

> (a) Finding 2(ii) by its terms did not require any rate reduction to pass on the substantial decrease in United's rates for deliveries at Kosciusko, this reduction being related to the proceedings at Docket G-1142 under Section 5 of the Natural Gas Act rather than those at Docket G-2019 under Section 4 of the Act.
>
> (b) Texas Eastern under Finding 2(ii) was obligated only to pass on to its customers the cash refund received from United in 1954 pursuant to Opinion 277, in the amount of $385,569.

Texas Eastern's New Settlement Offer

Despite its interpretation of Finding 2(ii), Texas Eastern at the same time advised the Commission that certain of its customers disagreed with this interpretation and that it had taken "steps to reach an amicable settlement agreement with its customers in full and complete discharge of all obligations under" Finding 2(ii) (R. 93).

By this new settlement offer, Texas Eastern

(a) made a voluntary tender of substantial sums which departed from any interpretation of Finding 2(ii) which had up to that time been discussed, and did this without application to or approval by the Commission; and,

(b) tendered the total amount of $3,862,572 to its jurisdictional customers of which $2,811,501 was accepted by all customers except the Columbia Companies who declined a tender of their share in the amount of $1,051,071.

The Commission's Refusal to Accept Texas Eastern New Settlement Offer

The Columbia Companies protested Texas Eastern's tender and offer of settlement and the Federal Power Commission by order of March 13, 1961 advised Texas Eastern that it was unable to accept said refunds as being in compliance with Finding 2(ii).

In substance, the protests of the Columbia Companies (R. 101-113) and the said order of the Federal Power Commission (R. 127-129; App. B, p. B-1, infra) are to the effect that Texas Eastern

(a) is obligated to refund to its jurisdictional customers under Finding 2(ii), an amount representing the

net difference in rates charged Texas Eastern by United as fixed by Opinion 277 effective August 1, 1954, and those rates of United in effect prior to Opinion 277;

(b) The period of time over which such rate reduction should be computed and reflected in said refund should be that commencing August 1, 1954 and ending November 10, 1957, the date upon which Texas Eastern's Docket G-1964 rates were lawfully superseded by its subsequent rate filing; and

(c) Texas Eastern's voluntary offer of settlement of $3,862,572 does not reflect the *net difference* in United's rates before and after the Opinion 277 rates were placed in effect during the entire period from August 1, 1954 to November 10, 1957, and to that extent Texas Eastern remains obligated to the Columbia Companies and its other customers under a proper interpretation of Finding 2(ii).

Texas Eastern, as indicated by its answer to the protest of the Columbia Companies (R. 113-126) relied upon the technicality that a literal interpretation of the language of Finding 2(ii) applied to the fact that the "final" order in Docket No. G-2019 was not issued until September 11, 1958, when the Mississippi River Fuel Corporation proceedings were finally disposed of (R. 115), excused Texas Eastern from reflecting any rate reduction realized from United by virtue of deliveries at Kosciusko, Mississippi.

This in spite of its earlier representation to the exact contrary! (p. 7, *supra*.)

Texas Eastern's contention was that the Kosciusko rates technically could not have been reduced under the filing at Docket No. G-2019 and that the failure to refer to both Dockets G-1142 and G-2019 in Finding 2(ii) was determinative. The Court of Appeals in effect adopted this literal interpretation.

On the other hand, the Federal Power Commission by its order of March 13, 1961 rejecting Texas Eastern's purported report of compliance with Finding 2(ii), made the following important observation with regard to Texas Eastern's technical position:

> "The support for your proposal, i.e., that there was no reduction in United's rates in Docket No. G-2019 but instead an increase and that final judgment was not rendered until September 11, 1958 is not in accord with the Commission's interpretation of the facts of record in that docket. The order accepting and suspending certain of United's rate schedules in Docket No. G-2019 made all of the rate levels subject to the Commission's rate investigation in Docket No. G-1142. Thus any rate reduction in consolidated Docket Nos. G-1142, G-2019, et al. became a rate reduction in Docket No. G-2019. Final judgment as to rates charged by United to Texas Eastern was rendered by Opinion No. 277 issued November 2, 1954. The order of September 11, 1958 merely terminated proceedings in Docket No. G-2019, et al. upon settlement of the remaining issue of the rates charged to Mississippi River Fuel Corporation by United." (R. 128; Appendix B-2, *infra*)

The Court's Decision

The Court's decision adopts Texas Eastern's technical distinction of the Commission's rate jurisdiction under Sections 4 and 5 of the Natural Gas Act (R. 321; Appendix B-20, *infra*). The Court's premise was that the reduction in United's rates at Kosciusko could have come about only in the Section 5 proceeding at Docket No. G-1142, there being no jurisdiction in Docket No. G-2019 (a Section 4(e) proceeding) to *lower* rates at Kosciusko because no filing had been made by United to alter these rates. Bearing in mind the fact that this was a rate settle-

ment under a *consolidated* proceeding, and that in any event the Section 5 proceeding at Docket No. G-1142 was dismissed without specific reference to *any* rate at Kosciusko or elsewhere,* such an interpretation to Texas Eastern's benefit and against the interests of consumers represented by Texas Eastern's wholesale customers is in error. Such an interpretation by the Court raises serious questions as to the rights and duties of the Federal Power Commission to enforce settlement agreements which often go beyond the immediate scope of a particular rate filing of a natural gas company, in accordance with its detailed and expert understanding of the nature of the proceedings.

The Court made no determination as to whether the Columbia Companies were now free to accept the tender (accepted by Texas Eastern's other customers) previously made by Texas Eastern and protested by Petitioners, the Columbia Companies.

The Court conceived that the question of the amount of interest owing to the Columbia Companies would be determined by whether or not the Columbia Companies were ultimately held to be entitled to the protested tenders. The Court said:

> "So far as concerns the intervenor Columbia companies, our holding would be the same to the extent that they are now free to accept, as did all others, the tender covering elements [b] and [c]. To the extent that by their refusal to accept the tender, they have now lost the opportunity of receiving like payments for elements [b] and [c], we would consider that for refunds of element [a], the Commission had ample basis for awarding 6% interest on those amounts. As the record is unclear as to this phase and calculations in any event would be required, the cause is remanded to the Commission as to this."

*See Opinion 277, 13 FPC 398, 418

The failure of the Court to resolve this question was pressed by the Columbia Companies in their Petition for Rehearing (R. 335, *et seq.*), but was not discussed by the Court below in denying same.

The Pending Remand Proceedings

The proceedings on remand are now pending before the Commission. The Columbia Companies have advised the Commission that it is their position that Texas Eastern, by virtue of the decision of the Court below, is obligated to refund to them $1,051,071 in accordance with the requirements of Section 4 of the Natural Gas Act which prohibits discrimination in the rates charged and received by Texas Eastern as a natural gas company.

The Columbia Companies have also advised the Commission that they would be obligated to pass on to their wholesale customers and ultimate consumers approximately 85% of any of such amounts received from Texas Eastern.

Texas Eastern has denied any obligation to the Columbia Companies in excess of $119,421, plus $26,070 in interest, or a total of $145,491, being their share of the $385,509 refund which the Court below held to be Texas Eastern's sole legal obligation under Finding 2(ii).

REASONS FOR GRANTING THE WRIT

1. The Court's reversal of the Commission's order is contrary to the interest of the ultimate consumer, both in immediate effect and in the limitation of the Commission's jurisdiction to maintain continuing supervision and control over rate settlement proceedings to their conclusion.

It is the ultimate consumer of gas who bears the ultimate burden of rate increases and the same consumer who benefits from rate refunds resulting from rates found to be excessive. *F.P.C. v. Tennessee Gas Transmission Company,*

371 U. S. 145 (1962). Therefore, the pipeline companies are not permitted among themselves to determine the reasonable level of rates, but the Natural Gas Act entrusts the protection of the public from excessive rates to the Federal Power Commission. The purpose of the Natural Gas Act is the protection of the consumer. *F. P. C.* v. *Hope Natural Gas Company*, 320 U. S. 591 (1944).

There has been an increasing trend toward resolving rate proceedings via the settlement route, that is, the parties to a rate litigation resolve many, if not all, issues through negotiations, and such settlements are presented to the Commission for approval. The Commission's function in such a situation is not to rubber stamp the agreement reached by the parties, but to consider such agreement in terms of its consistency with Section 4 or 5 of the Act as the case may be. The examples are legion of where the Commission refuses to approve such a settlement or makes significant modifications therein. To merely approve because the litigants have agreed would be an abdication by the Commission of its duties under the Act.

In immediate effect, the Court's decision deprives ultimate consumers of the right to have determined the entire savings in cost of gas purchased by Texas Eastern from United for the period August 1, 1954 to November 10, 1957 and to receive the benefits thereof either directly or indirectly. As previously indicated the Columbia Companies would be obligated to pass on to their customers approximately 85% of the amounts received from Texas Eastern in the subject proceeding.

In the more general and compelling sense, the Court's decision prohibits the Commission from taking into consideration its own detailed knowledge of the settlement in United's combined Section 4 and Section 5 rate proceeding, to determine whether the Texas Eastern settlement, in view

of the regulatory maze in which United's cases developed, required Texas Eastern to pass on the net savings it actually realized or only some portion thereof. To prohibit the Commission from applying its informed and legally supported judgment with respect to a settlement agreement which the Commission itself had approved is fundamentally in error. The decision of the Court constitutes a precedent which should not prevail in the long-run interests of proper administration of the Natural Gas Act.

The nature of the proceedings here involved exemplify the factual and procedural complexities of such rate proceedings. The end result of Texas Eastern claiming legal liability for only $385,569, under one provision of a rate settlement agreement, yet voluntarily tendering $3,862,572 as an "amicable settlement" of the disputed interpretation of the same provision indicates the necessity for continuing Commission control and jurisdiction over the details of the execution of settlement agreements even after approval.

There is added significance in the fact that United's Section 4 and Section 5 proceedings were disposed of by a settlement agreed to among its customers and approved by the Commission. Settlements by nature are concerned with the end result and not the niceties of jurisdictional abstractions which do not affect the result. In this important respect, the Court's legalistic basis for reversing the Commission is all the more disturbing as an undue limitation on the administrative process. Being in the face of Texas Eastern's voluntary $3,862,572 tender and despite the inconsistency of Texas Eastern's own admissions and actions during the pendency of the proceedings, the Court's decision is an erroneous intrusion on regulatory proceedings.

The over-simplification of complex administration proceedings, involving a difference of over three and one-half million dollars in refund liability from a natural gas com-

pany to its customers is simply not one that can be passed over lightly.

The foregoing statement has attempted within the requirements of brevity called for by this Petition, to exemplify Texas Eastern's motivation (which is perfectly apparent to any one involved in the natural gas wholesale business subject to Federal Power Commission regulation) of endeavoring to work out a set off against successive rate increases by its supplier, United, without Texas Eastern having to file additional rate increases with the Federal Power Commission pursuant to Section 4 of the Natural Gas Act, with the attendant filing and hearing requirements. The Natural Gas Act, as consistently interpreted by the Federal Power Commission and the Courts, does not permit such a short-cut.* As a close study of the chronology of the filings will indicate, Texas Eastern finally made its voluntary settlement in 1958 in such a way that it did actually accomplish a partial set off of the second of United's three rate filings—i.e. that filing which United made effective ~~September 30~~ November 15, 1950 (p. 18 *supra*).**

All this was ignored or lost sight of in the Court's preoccupation with concepts of contractual interpretation—to the ultimate detriment of Texas Eastern's customers and the consuming public.

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*Mississippi River Fuel Corporation v. F. P. C., 281 F2d 919 (D. C. Cir. 1960).

**See the Court's chronology of the periods to which Texas Eastern's new 1958 settlement offer applied (Appendix B-20, *infra*), which is essentially correct except for the implication that the increment of $1,097,967 in item (c) covers the entire refunds due on net savings in cost of gas purchased from April 1, 1956 to November 10, 1957. It does not, this being the amount actually in controversy at this time between Columbia Companies and Texas Eastern and which Columbia Companies contend should and can easily be determined by remand to the Commission.

2. The Court's interpretation of "the technical, but profound, distinction between the nature of a Section 4 and a Section 5 proceeding" under the Natural Gas Act (R. 321) is contrary to previous decisions of this Court.

The Commission is authorized under Section 4(e) of the Act to make such orders, after hearing, with reference to a suspended rate change "as would be proper in a proceeding initiated after it had become effective." This has been judicially interpreted to authorize such orders as the Commission might issue in a Section 5(a) proceeding. *Hope Natural Gas Co. v. F. P. C.*, 196 F2d 803 (4th Circ., 1953). The Commission is authorized under Section 5(a) of the Act "to set aside and modify any rate or contract, which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory or unduly preferential.'" *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, 337 (1956). It would thus seem that the Commission in a Section 4(e) proceeding, could issue any rate change order supported by the record which it could issue in a Section 5(a) proceeding.

> "... the very premise that §§ 4(d) and (e) and 5(a) are alternative rate-changing 'procedures' is itself based on a misconception of the structure of the Act. *These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful.*" (emphasis supplied) (*United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, *supra*, *at Page 340.*)

Furthermore, in *F. P. C. v. Sierra Pacific Power Company*, 350 U. S. 348 (1956), this Court stated that if a Commission rate investigation proceeding satisfies in sub-

stance, the requirements of a Section 5(a) proceeding and the necessary findings are made, a rate change ordered by the Commission in such proceeding in accordance with its powers under Section 5(a) of the Act would be upheld regardless of whether the proceedings started as an investigation of the reasonableness of a proposed rate change or an investigation of an existing rate. It follows from this that, if the record in a Section 4(e) proceeding would support a finding that a rate which was not sought to be increased in such proceeding was unlawful, the Commission could order a change in such unlawful rate upon making the necessary findings. Cf., *Railway Express Agency* v. *C. A. B.*, 243 F2d 422 (D. C. Cir., 1957), *Ayrshire Collieries Corporation* v. *U. S.*, 335 U. S. 573 (1949). Petitioners submit that the Commission would not only have the power, but also the duty, to do this.

3. The Court's remand order raises the question of whether the decision below is interlocutory and premature for this Court's consideration on Writ of Certiorari.

The paragraph of the Court's decision cited above (p. 13, *supra*) establishes that nothing on remand can affect the central issue of Texas Eastern's proper obligation under Finding 2(ii). On the contrary, the remand proceedings can only give rise to new peripheral issues entirely extraneous to Finding 2(ii) as to interest due and the Columbia Companies' right with respect to the "new" settlement offer which Texas Eastern voluntarily paid to some of its customers in 1958. Texas Eastern's underlying rate proceedings have been pending since 1952. The remand ordered by the Court below will do nothing to amplify or settle the central issues which are now ripe for consideration by this Court. In fact, it can be anticipated that the remand of the Court will serve only to set off a new round

of legal proceedings on the above described peripheral issues, removing any hope of early resolution of this long-pending case. It is respectfully urged that temporizing will result only in detriment to the ultimate consumer whose stake in these proceedings has already been held too long in suspension. The Columbia Companies have diligently pursued their remedies in this proceeding. They deplore the time already consumed and respectfully request careful resistance against further delay.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN F. SISSON
Counsel for Petitioners

September 19, 1963

APPENDIX A

I. **Natural Gas Act.** Act of June 21, 1938, c. 556, 52 Stat. 821, as Amended February 7, 1942, c. 49, 56 Stat. 83, July 25, 1947, c. 333, 61 Stat. 459, March 27, 1954, c. 115, 68 Stat. 36, and August 28, 1958, 72 Stat. 947; U. S. C. A., Title 15, sec. 717 et seq.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together

with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge,

classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * *

SEC. 5. [15 U.S.C. 717d] (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdic-

tion of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

APPENDIX B

FEDERAL POWER COMMISSION
Washington 25

MAR 13, 1961

Texas Eastern Transmission Corporation
P. O. Box 1612
Shreveport, Louisiana

Attention: Mr. B. D. Goodrich
Senior Vice President

Gentlemen:

The Commission is unable to accept the refunds made by Texas Eastern Transmission Corporation, described in your letter of February 23, 1959, as being in full compliance with Finding 2(e)(i) of the order issued October 9, 1953 in Docket No. G-1964. The proposal of refunds on the same basis to The Manufacturers Light and Heat Company and the Ohio Fuel Gas Company (Columbia companies) is likewise unacceptable.

The above Finding required Texas Eastern, among other things, to refund promptly and to file rate reductions commensurate with the refund and rate reduction received from United Gas Pipe Line Company in Docket No. G-2019. Texas Eastern did not make the required refund or rate reductions promptly after United complied with the approved settlement agreement in Docket Nos. G-1142, G-2019 et al., but now proposes one refund in lieu of the above rate reductions and refund.

The Commission finds that the total amount Texas Eastern proposes to refund is insufficient since it does not cover the required rate reductions for the period April 1, 1956 until November 19, 1957, and does not provide for interest payments at 6% per annum on the refunds.

Texas Eastern's failure to make prompt refunds and rate reductions requires such interest obligation. (See Mississippi River Fuel Corporation v. Federal Power Commission, U. S. App. D. C., Cause No. 15167 decided June 30, 1960, Certiorari denied.) Your letter advises that the total refund is made up of (1) a refund of $385,569 from United, (2) an amount equivalent to the required rate reduction for the period August 1, 1954 until April 1, 1956, and (3) an amount of $1,097,967.33 in lieu of a contingent refund undertaking set forth in certain negotiations with your customers. Aside from the required interest payments, the amounts set forth in (1) and (2) would be acceptable but the amount in (3) is insufficient without regard for the claimed contingent refund basis for it to cover the required rate reduction and refund for the period April 1, 1956 to November 10, 1957.

The support for your proposal, i.e., that there was no reduction in United's rates in Docket No. G-2019 but instead an increase and that final judgment was not rendered until September 11, 1958, is not in accord with the Commission's interpretation of the facts of record in that docket. The order accepting and suspending certain of United's rate schedules in Docket No. G-2019 made all of the rate levels subject to the Commission's rate investigation in Docket No. G-1142. Thus any rate reduction in consolidated Docket Nos. G-1142, G-2019, et al. became a rate reduction in Docket No. G-2019. Final judgment as to rates charged by United to Texas Eastern was rendered by Opinion No. 277 issued November 2, 1954. The order of September 11, 1958 merely terminated proceedings in Docket No. G-2019, et al. upon settlement of the remaining issue of the rates charged to Mississippi River Fuel Corporation by United.

Since the refunds made and the proposed refunds to the Columbia companies are insufficient to comply fully with

Findings 2 (ii) of the October 9, 1953 order in Docket No. G-1964, and do not provide for interest payments which are now required, you are hereby directed to refund (1) the $385,569 refund received from United and (2) a refund for the period August 1, 1954 to November 10, 1957 equivalent to the net rate reduction received from United in consolidated Docket Nos. G-1142, G-2019, et al., both to be distributed among your customers as provided in the above Finding, together with interest payments at 6% per annum on all refunds from the date of receipt of such excess amounts to the date of refund.

By direction of the Commission.

(s) J. H. Gutride
Secretary

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

JEROME K. KUYKENDALL, Chairman;
FREDERICK STUECK and ARTHUR KLINE.

TEXAS EASTERN TRANSMISSION CORPORATION — Docket No. G-1964

ORDER DENYING APPLICATION FOR REHEARING AND STAY

(Issued May 11, 1961)

The Commission by letter dated March 13, 1961, advised Texas Eastern Transmission Corporation (Texas Eastern) that the proposed refunds described in its letter of February 23, 1959, in purported full compliance with Finding (2) (ii) of the order issued October 9, 1953 in this proceeding, were insufficient and unacceptable. That letter also directed Texas Eastern to refund (1) the $385,569 cash refund received by Texas Eastern from United Gas Pipeline Company and (2) a refund for the period August 1, 1954 to November 10, 1957 equivalent to the net rate reduction received by Texas Eastern from United Gas in consolidated Docket Nos. G-1142, G-2019, *et al.* The Commission's letter dated March 13, 1961, further directed that both of the foregoing refunds be distributed to Texas Eastern's customers as provided in Finding (2)(ii) of the order issued October 9, 1953, together with interest payments at 6 percent per annum on all refunds from the date of receipt of such excess amounts to the date of refund.

On April 11, 1961, Texas Eastern filed an application for rehearing and for a stay of the latter order, issued March 13, 1961. In its application, Texas Eastern urges that we grant rehearing in this matter and thereupon withdraw the letter order issued March 13, 1961, and determine that it has fully complied with the refund requirements of Finding (2)(ii) of the order issued October 9, 1953, or that we modify that letter order and approve the "settlement agreements entered into between Texas Eastern and its affected customers" and notify Texas Eastern that no additional refunds or interest are required with respect to said customers. Texas Eastern also requests that the operation of the letter order be stayed until final order of the Commission herein or final determination of a petition to review such letter order.

We have carefully reviewed the application filed by Texas Eastern on April 11, 1961, and reconsidered the record in this proceeding including the pertinent decisions and orders in this proceeding and related proceedings and each of the items referred to by Texas Eastern in its application. It is our view that the application for rehearing and stay sets forth no new facts or principles of law which afford any basis for modification of our letter order issued March 13, 1961. It is our further view that the payment of the refunds in this matter are long overdue and that a further stay in this matter would not be in the public interest.

While our letter order issued March 13, 1961, did not at the time within which the required refunds are to be made, it of course implied that such refunds are to be made within a reasonable time. We believe a period of 60 days from the date of issuance of this order is reasonable and also sufficient to permit Texas Eastern to take such further ac

tion as it deems necessary. It also represents the time usually prescribed by the Commission for the making of refunds.

The Commission finds:

(1) The assignments of error and grounds for rehearing contained in the application for rehearing filed by Texas Eastern on April 11, 1961, set forth no new facts or principles of law which were not fully considered by the Commission when it issued its letter order March 13, 1961, or which now having been reviewed or reconsidered warrant any modification of the said letter order. Such specifications of error, contentions and arguments contained in the above application for rehearing as are not specifically disposed of in the letter order issued March 13, 1961, are without reasonable basis in law, or are immaterial to the appropriate disposition of this proceeding.

(2) Texas Eastern's request for stay would further delay the effectuation of the refund requirements of this proceeding contrary to the public interest, and should be denied.

The Commission orders:

(A) The requests for withdrawal or modification of the letter order issued March 13, 1961, contained in Texas Eastern's application for rehearing filed April 11, 1961, and the request for stay of that letter order urged by Texas Eastern in said application, hereby are denied.

(B) Within 60 days from the date of issuance of this order Texas Eastern shall make the refunds as directed by the letter order issued March 13, 1961, and within 15 days after making such refunds, Texas Eastern shall report to the Commission, in writing and under oath, the amount of

refund made to each of its customers, showing separately the amount of principal and interest so paid, the billing determinants or other bases used for such determination, and shall serve a copy of such report upon each of the customers receiving a refund. Concurrently therewith, Texas Eastern shall file with respect to such refunds releases from its customers showing receipt of the principal and interest in conformity with Finding (2)(ii) of the order issued herein on October 9, 1953 and the letter order issued March 13, 1961.

By the Commission.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19046

TEXAS EASTERN TRANSMISSION CORPORATION,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

Petition for Review of Orders of the Federal Power Commission.

(July 19, 1962)

Before RIVES, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: Of all of the litigation arising under the Natural Gas Act, this is a most unusual case. The first, at least of recent vintage, and perhaps the last of its kind, it does not really challenge an order of the Federal Power Commission as such. What is involved is a settlement agreement—a voluntary settlement contract made by parties in an adversary position, and thereafter approved by the Commission as the basis for tariff rates. The tariffs

for rates, as such, are likewise not in question. The dispute is an everyday run-of-the-mill controversy over the interpretation and meaning of the settlement agreement. All of this comes in a sort of a back door process. For the problem arises because the Commission by the letter-order nominally under review, § 19 (b), 15 USCA § 717 r (b), has directed Petitioner to make certain refund payments pursuant to that settlement. The correctness of that order immediately depends on the correctness of the Commission's interpretation of the private contract. Except, perhaps, as to interest as a sanction for nonperformance, the Commission does not undertake to make any substantive orders on the basis of any provisions of the Natural Gas Act. What, and all, it does is to order the Petitioner to do what the Commission conceives the contract calls for. Though the parties are at odds as to the Commission's reading of this agreement, there is no controversy over its power and duty to act.

In assaying that problem, there is really not a significant difference over a significant principle of law. The case boils down to the one simply stated: what did the parties mean? The usual aid to construction of contracts are advanced pro and con, but as with statutory construction, the familiar canonical formulae are of so little real help until the decision is reached, whereupon each fits perfectly into the predetermined conclusion. *Hattaway v. United States*, 5 Cir., 1962—F. 2d—,—[No. 19228, June 6, 1962]. We must recognize, of course, that here, as in every situation of contract interpretation, the Court must put itself in the position of the parties. *Fidelity-Phenix Fire Ins. Co. v. Farm Fire Service*, 5 Cir., 1958, 255 F. 2d 658 at 660; *Indemnity Ins. Co. of North America v. Du Pont*, 5 Cir., 1961, 292 F. 2d 569, 574; *U. S. Industries, Inc. v. Cameo, Inc.*, 5 Cir., 1960, 277 F. 2d 292 at 295, 296, note 14. That means that we must read the agreement in the setting of the

Natural Gas Act. This includes the relative rights and duties of parties to the underlying transactions and the nature and scope of the controversies out of which this hope-for solution came into being.

These comments we regard as something more than a mere introductory preface. For Commission-approved voluntary settlements are an important and desirable mechanism as the Commission undertakes the staggering burden of dealing with the ceaseless flow of the ever-more complicated problems facing an inadequate staff as a result of the celebrated 1954 *Phillips* decision.[1] Consequently settlements should be encouraged, not discouraged.[2] And while

[1] Phillips Petroleum Co. v. Wisconsin, 1954, 347 U. S. 672, 74 S. Ct. 794, 98 L. Ed. 1035.

[2] The Commission is the first to recognize the indispensability of settlements. It regards promotion of voluntary settlements to be a duty imposed by law. In its September 11, 1958 order on the related Mississippi River-Gulf of Mexico dispute it had this to say:

> "However, settlements, as a rule, are favored in the law. § 5 (a) of the Administrative Procedure Act requires us to afford all interested parties an opportunity for, among other things, offers of settlement or proposals of adjustments, where time, the nature of the proceeding, and the public interest permit."

Moreover, settlements are imperative as a practical matter. See the First Quarterly Report (Release No. 11,647, 27 SEC Docket 354) of May 1962. The Chairman reported that

> "* * * as of March 31 the total dollar amount of pending pipeline rate increase cases had been reduced by over 40 million dollars in the first three months of 1962, from $388,190,900 as of December 31, 1961, to $347,131,800 on March 31, 1962. Further cases involving $48,085,700 of the total still pending at the end of March had been disposed of except for determination of the exact dollar amounts.
>
> "The decrease in the pipeline company rate case load resulted principally from the Commission's 5½-month-old program of encouraging settlements of rate increase proceedings. Through this vigorous program the Commission has avoided long and expensive hearings, and excessive rates previously collected by the pipeline companies have been promptly refunded."

We have had occasion recently to take notice of the almost insuperable tasks facing the Commission and its overburdened staff in H. I

the legal mind, or its artificer, has not yet progressed to the point of perfection in draftsmanship to eliminate controversy over a contract settling a controversy, one sure way to discourage voluntary settlements is for the Commission, at the behest of one party or the other, or the ubiquitous intervenors, to read into contracts things which are simply not expressed or not there, out of the thoroughly commendable (and understandable) feeling that unless that is done the result is not as good as it ought to have been. This is particularly true in this area where, as was the case here, the proposed settlement is subjected, as it should be, to the closest scrutiny by the Commission and its staff. It is more than arms' length. Overreaching is an impossibility. But precision is not merely a possibility. Precision is almost a certainty as skilled partisans undertake to hammer out the bargain under the ever-present watchful eye (and hand) of the independent agency as the guardian of the public interest. Consequently, both in its substantive provisions and in the terminology sought to memorialize the undertaking, the parties ought to be able to accept the contract as drafted, executed and approved. It should stand for what it says.

Hunt et al. v. FPC, 5 Cir., 1962, — F. 2d —, — note 15 [No. 19065, —— ——, 1962].

[2] The Commission in its order of September 14, 1958, sounded almost a note of despair in describing the interminable nature of the very proceedings involved here:

> "As noted above, the first of these proceedings was initiated nearly ten years ago, the second, nearly six years ago. Four years ago in our opinion No. 277, issued November 2, 1953, we approved a settlement of the seven proceedings mentioned above as to all of United's customers except as to Mississippi * * *."

And see note 35, infra, where it discusses the factors in the choice of voluntary settlement versus adversary adjudication to the bitter end.

Here the problem is precisely that when the parties[1] said Docket G-2019, did they mean G-2019? Did they mean G-2019 plus G-1142? Or did they mean, as the Commission now says they did, not only G-2019 *and* G-1142, but, "any and all rate reductions resulting from United's [the supplier's] rate proceedings"?[2]

Texas Eastern Dkt. G-1964

On May 1, 1952, Texas Eastern filed a § 4 (e) proposal for rate increases totaling approximately $42 million annually. This rate increase was suspended until November 1, 1952. The requested increase was based on the imminent increase in the cost of purchased gas. In the initial hearings in August 1952, the evidence of Texas Eastern showed that part was predicated on increased cost of gas delivered to it by United at Longview. Texas-United was also seeking a § 4 (e) increase in rates in Dkt. G-2019. This proceeding and its identifying number is of crucial importance in this case. The evidence and statements also showed a likely increase in the cost of purchased gas as a result of purchases commencing July 1, 1952 from United at Koscusko, Mississippi. The gas purchased at Koscusko is also of crucial importance. During these hearings an interim settlement

[1] The parties are identified as follows:

Texas Eastern — Texas Eastern Transmission Corporation
United — United Gas Pipe Line Company
Mississippi River — Mississippi River Fuel Corporation
Columbia — The Columbia Gas System
The Manufacturers Light and Heat Company
The Ohio Fuel Gas Company

[2] Brief for Respondent, p. 13.

agreed to by Texas Eastern and all of its intervenor-customers and the staff counsel, was entered into and approved by the Commission by Opinion No. 239. After further hearings in August 1953, the parties agreed to a final settlement. The Commission approved this settlement by its order.[5] Approval of the agreed rate schedules was expressly conditioned. This whole controversy turns on condition 2 (ii):

> "If, as a result of a final judgment in FPC Docket No. G-2019, Texas Eastern [x] receives a refund of any portion of amounts paid to United * * * for gas delivered at Longview, Texas, then Texas Eastern shall in turn promptly, and without additional cost or liability to Texas Eastern, distribute among all of its firm gas customers * * * the total dollars so refunded to Texas Eastern, such distribution to be in proportion to the volume of gas purchased from Texas Eastern on a firm basis during the period over which such refund accrued: * * * If * * * [y] United * * * as a result of a final judgment in Docket No. G-2019, * * * places in effect tariffs providing for lower sales rates to Texas Eastern than are currently in effect as of such date, and if the amount of such reduction is sufficient to permit its reflection in the rates charged by Texas Eastern to its customers without any net loss to Texas Eastern, then Texas Eastern shall file a reduction in the commodity charge of its rates in Rate Zones C and D which will as nearly as possible be equal to the combined reduction in rates

[5] "Order Approving Settlement and Permitting Tariff and Rate Schedules to Become Effective" in Dkt. G-1964 on October 9, 1953.

charged Texas Eastern by United Gas * * *. If [z] Texas Eastern is required to make a reduction in its rates pursuant to this agreement, such reduction, to the extent that it became necessary as a result of a final judgment in Docket No. G-2019, shall be made effective as of the date of such final judgment. * * *"

United's Dkt. G-2019

On July 3, 1952, United had filed a conversion tariff[2] which included an application for § 4 (e) rate increase for gas sold and delivered at Longview, Texas. On August 1, 1952, such rate increases were suspended by Commission order until January 3, 1953. United's proposed increase related to Longview only. The conversion tariff included a restatement of its rate schedule for sales to Texas Eastern at Kosciusko, Mississippi. But no change was proposed in this rate, and the Commission's order of August 1, 1952, made this rate schedule effective as of August 3, 1952. The Kosciusko rate was therefore firm and not subject to revision in G-2019. The Order did, however, take cognizance of the pendency of another distinct proceeding, United Docket G-1142.[3]

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[2]This was in compliance with Commission Order No. 114, 13 Fed. Reg. 6371, requiring that all rate schedules which then existed in the form of individually negotiated contracts between pipeline and purchaser be restated in the form of "tariff and service agreement."

[3]The Order in G-2019 provided:

"(E) This order is without prejudice to any finding or orders which have been or may hereafter be made by this Commission in Docket No. G-1142 * * *, and in any proceeding now pending, or hereafter instituted, by or against United Gas Pipe Line Company".

United's Docket G-1142

Almost four years previously the Commission on October 12, 1948 had instituted a § 5 (a) investigation of all of United's rates. This was Docket No. G-1142. By Order dated November 25, 1952, the Commission consolidated G-1142 and G-2019 together with other pending dockets of United "for purposes of hearing."

Proceedings in United's Dkts. G-1142 and G-2019 Consolidated

While the proceedings were consolidated "for purposes of hearing" each retained its characteristic identity for substantive action.[1] Thus, on January 14, 1953, the Commission by an order bearing solely "Docket No. G-2019" allowed the rates (previously suspended August 1, 1952) to go into effect subject to refund by United under a corporate surety bond. No reference of any kind was made so that order to G-1142. On November 2, 1954, the Commission issued

[1] In the preliminary finding the Commission Order stated: "It appears desirable to consolidate the rate investigation . . . Docket No. G-1142 . . . with the suspension proceedings at Docket Nos. G-2019 and G-2024 . . . that issue . . . may be heard together." The Order expressly provided that the proceedings "are consolidated for purposes of hearing" and carefully distinguished between the proceedings.

[2] So far as our record reveals, no refund order was issued between this date and October 1, 1958, the date of the rate settlement agreement order in G-1961, covering G-2019, was entered. The order requiring reduction in Transcontinental rates on November 2, 1954, was a year and three-quarters away.

an order in consolidated Docket Nos. G-1142, G-2019.[10] This opinion and order likewise was an approval of a settlement between United and all of its customers except Mississippi River. United was directed to file new rate schedules incorporating the settlement rates, which were agreed to be effective as of August 1, 1954. United was also directed to make refunds of rates subject to § 4 (e) proceedings. United's refund to Texas Eastern for Longview deliveries totaled $385,569.[11]

The existing pre-August 1, 1954, non-suspended rates for Kosciusko deliveries were also reduced. It is this reduction which is at the center of our controversy. It simplifies matters by pointing out now that there are two serious questions. First, was this a reduction by United "as a result of a final judgment in Docket No. G-2019"[12] as condition 2 (ii) stated? Second, and because of circumstances now to be stated, was any such judgment "final" as of either November 2, 1954, its date, or its stated effective date, August 1, 1954? The second question arose because Mississippi River objected to the settlement on the principal ground that it was entitled to certain "rolled in" rates from United. Consequently, the Commission directed that United's settlement rates should not be applicable to Mississippi River. Despite this undetermined phase, United, in compliance

[10] In the official Reports of Commission decisions (opinion 277 hears this caption:

"In the Matter of
United Gas Pipe Line Company
Opinion and Order Approving Proposed Rates and Providing for Further Hearings
Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, G-2220, and G-2378
November 2, 1954"

[11] This refund is covered by element (v) of condition 2 (ii). See elements (vi) and (x).

with a previous order of the Commission, filed new rate schedules on January 24, 1955, effective as of August 1, 1954. Mississippi River, after the Commission rejected its objections, appealed to the Court of Appeals for the District of Columbia. On appeal the Court of Appeals rejected that contention, but reversed and remanded the order for further proceedings on another point.[13] Subsequent to remand to the Commission, the proceedings were terminated September 11, 1958, by a settlement between Mississippi River and United in which Mississippi River accepted the rates to which everyone else had agreed in October 1954. Expressing—almost, we suspect, with a note of despair—the laudable aim that "it is in the public interest that these proceedings come to an end,"[14] the Commission entered an order approving the settlement between Mississippi River and United. It also ordered that the "proceedings in Docket Nos. G-1142 and G-2019 are hereby terminated."

United's Interim § 4 Increases

Dkt. No. G-9547,
Dkt. No. G-10592.

Meanwhile, as this was dragging on through Mississippi River's appeal ending finally in its accepting the order appealed from, United superseded the rates prescribed by G-1142 and G-2019 by filing two successive § 4 rate increases. In September 1955, United filed a proposed increase which was docketed and was suspended in G-9547.

[13] Mississippi River Fuel Corp. v. FPC, D. C. Cir., July 8, 1957, 252 F. 2d 619, cert. denied 355 U. S. 904, 78 S. Ct. 331, 2 L. Ed. 2d 268.

[14] In a footnote related to this text, the Commission stated "termination of these proceedings as to Mississippi will close out Docket Nos. G-1142 and G-2019 in their entirety. Opinion No. 277 and order issued August 13, 1958, in Docket Nos. G-1142 et al."

These rates became effective on April 1, 1956. There was a further increase suspended and docketed in G-10594 effective as of November 16, 1956.[15] As a matter of fact, the present controversy really centers around these intervening increases. For by the terms of the 1958 "settlement of the settlement" proffered by Texas Eastern, which we discuss later, it has offered to refund the net reduction in United's rates to Texas Eastern relating to Kosciusko deliveries for the period August 1, 1954 to April 1, 1956,[16] but it objected to any such "refund" after April 1, 1956, at which time United's rates were increased substantially above the August 1, 1954, level.[17] So far as United and its customers—here Texas Eastern—were concerned, there could no longer be any savings or "reduction" by virtue of G-2019, for the rates prescribed in G-2019 had twice been successively superseded. This follows from the words of § 4 (e) which provide that if, at the expiration of the suspension period, the § 4 hearings have not been concluded, then, on motion and order of the Commission "the proposed change of rate, * * * shall go into effect." § 4 (e).

Texas Eastern's Post G-2019 Actions

The actions subsequently taken by Texas Eastern, the subject of much discussion in the briefs, have significant rel-

[15] In G-9547 the proposed rate was suspended October 21, 1955 until April 1, 1956. In G-10592 the rates were suspended June 15, 1956 until November 16, 1956.

[16] Texas Eastern states that the net increase in United's rates to Texas Eastern for the period April 1, 1956, to November 10, 1957, totaled $8,608,214.

[17] This amounts to $2,379,035.

[17] Texas Eastern states that if United had not increased its rates on April 1, 1956, and November 16, 1956, the amount of reduction to Texas Eastern for the period April 1, 1956 to November 10, 1957, would have been $2,295,769.

evance in several ways. First, there is the question whether its conduct puts a construction on the settlement contract contrary to its present contentions. The second, is the question of timeliness of compliance, especially as it bears on the interest problem. The third is to see just what, apart from timeliness, it has tendered as compliance with the settlement agreement (and order).

While reversed in point of time, it simplifies matters to discuss first that which is last. Following the order of September 11, 1958, approving the United-Mississippi River settlement—and which, by whatever name called, put an end once and for all to everything which then was still in G-2019—the Commission instructed Texas Eastern to inform the Commission of its compliance with the terms of Condition 2 (ii) of G-1964. Its reply of October 6, 1958, stated that it had now made "settlements" of the Condition 2 (ii) settlement agreement with all of its customers except the Columbia companies. Correspondence with these customers from October 1958 to February 1959, filed with Texas Eastern's response, showed that while it had consistently maintained that its maximum refund obligation under 2 (ii) was the sum of $385,569 received from United in G-2019,[18] some customers contended they were entitled to greater refunds. Consequently, the report continued, Texas Eastern refunded or tendered to all customers, including the Columbia companies,

[18] See note 11, supra and related text.

[a]	[b]	[c]
The sum of $385,569	The additional sum of $2,379,035 representing savings August 1, 1954 to April 1, 1956[19]	An added sum of $1,097,967.33 in lieu further future refunds, if any, in G-9547 or G-10592 for period April 1, 1956 to Nov. 10, 1957

The Commission's order impliedly concurs in elements [a] and [b], but it does not directly treat with [c]. But the effect of its order demonstrates that a sharp difference exists to this period of time between April 1, 1956 and November 10, 1957.[20] This "sharp difference" was, however, slow in being registered or disclosed since the Commission took no formal action on Texas Eastern's last compliance report of February 23, 1959, until the letter order of March 13, 1961 now under review.[22]

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[19]See note 16, supra and related text.

[20]As of this date, final action had not been taken in G-9547 or G-10592 concerning the successive §4 increases. These customers preferred this lump sum cash figure over Texas Eastern's previous offer to make additional refunds of the amount by which United's rate for the period from August 1, 1956, to November 10, 1957, might be reduced below its pre-August 1, 1954, rate level as a result of the final judgments in G-9547 and G-10592.

[21]The Commission's letter order of March 13, 1961, presently under review directed Texas Eastern "to refund (1) the $385,569 refund received from United and (2) a refund for the period August 1, 1954 to November 10, 1957 equivalent to the net rate reduction received from United in consolidated Docket Nos. G-1142, G-2019 * * * with interest * * * at 6% * * * ."

[22]This inactivity was justifiable, the Commission says, because of Mississippi River's appeal from the "settlement of the settlement," ending in the decision of the Court of Appeals in Mississippi River Fuel Corp. v. FPC, D. C. Cir., 1960, 281 F. 2d 919, cert. den. 365 U. S. 827, 81 S. Ct. 712, 5 L. Ed. 2d 705. Of course, as we discuss

Whatever its sufficiency or its timeliness, this was the first tender of compliance by Texas Eastern. Up to October 1958 it had maintained that compliance was not yet required. It is this exchange of reports, correspondence, inquiries and a motion to amend which serves as the basis for the Commission's arguments that this conduct put a construction on condition 2 (ii) contrary to that presently asserted.

The Commission's opinion No. 277, issued November 2, 1954, in G-1142, G-2109 made the rate changes effective August 1, 1954. United thereafter filed its reduced rate. But on February 23, 1955, Texas Eastern advised the Commission and its customers of its legal counsel's opinion[23] that the order entered in G-2109 was not "a final judgment" in view of Mississippi River's unwillingness to accept the settlement, and its further proceedings pending before the Commission terminating in the reversal and remand by the Court of Appeals.[24] Texas Eastern concluded that "until

later, the Commission considers inactivity by Texas Eastern unjustifiable during the first Mississippi River appeal ending in the decision of Mississippi River Fuel Corp. v. FPC, D. C. Cir., 1957, 252 F. 2d 619.

[23] Counsel's opinion did not undertake to construe Condition 2 (ii). The opinion was in response to a request "as to what action you [Texas Eastern] should take in order to protect yourself in the event of a subsequent reversal of Opinion Nos. 277 *, * *, or in the event that upon rendition of a final judgment it should be determined that you are required, pursuant to provisions of the G-1964 order [Condition 2 (ii)] to refund cash or reduce your rates to your customers." It then went on to speak in terms of "the maximum obligation which Texas Eastern could incur." This portion concluded with the caveat, "we emphasize that this is the maximum *possible* liability of Texas Eastern and that this statement by no means should be considered as an opinion that Texas Eastern is or will be liable to that extent to any party or parties." (emphasis in the original)

[24] Mississippi River Fuel Corp. v. FPC, D. C. Cir., 1957, 252 F. 2d 619.

such time as a final judgment is rendered in Docket No. G-2019" it would set up certain reserves but "we will make no refunds to customers, nor reduce filed rates." The Commission by letter of March 14, 1955, rejected this. It stated, "The opinion of counsel upon which you base your decision rests solely upon the conclusion that Opinion No. 277 is not a final judgment as to you. This conclusion is incorrect. Opinion No. 277 is a final order and determination as to all matters presented and issues involved in Docket No. G-2019, except as to the claimed rights of Mississippi River * * *." Consequently, the Commission concluded, Texas Eastern was "expected to comply with the express terms of * * * (2) (ii) * * * without delay, insofar as it requires[25] you to distribute promptly refunds paid to you by United and to reduce your rates and charges as a result of the reduced rates and charges filed by United."

There was further correspondence and conferences resulting in a lengthy letter of July 8, 1955, reiterating Texas Eastern's refusal to make immediate rate reductions. This letter the Commission now regards as of crucial importance because of the statement contained in it that Texas Eastern had "sought to make it entirely clear that it had no quarrel with the requirements of Finding (2) (ii), and that its only area of disagreement with the Commission was as to the time when the Company should be required to take action."[26]

[25]The letter did not undertake to declare what rate reduction came within the phrase "insofar as it requires" or the earlier reference in the letter to Condition 2 (ii) that it "also provides for the reduction, under specified conditions of certain of your rates * * *."

[26]As Texas Eastern urges that the full context does not purport to construe Condition 2 (ii) or, worse, constitute an acquiescence in the

Compliance by Texas Eastern being postponed pending a "final" judgment in G-2019 time rolled on. In the meantime, United, which could wait neither for time nor tide, faced with increased costs, filed its rate increases in September 1955 in G-9547 (see note 15, supra). This precipitated the motion of Texas Eastern, October 14, 1955, to amend Condition (2) (ii) because United has now filed new rate schedules reflecting an increase in its rates to Texas Eastern for sales of gas for Longview, Texas and Kosciusko, Mississippi, to become effective November 1, 1955.[24] This proposal was contested by various customers and by formal motion of Texas Eastern leave was given to withdraw it, February 20, 1956. Though incompleted, unaccepted, and subsequently withdrawn, the Commission asserts that its terminology likewise committed Texas Eastern to a construction which included rate reductions at Kosciusko with in G-2019 rather, than as now contended in G-1142.[25]

Commission's present construction of that Condition, we set out the full excerpt:

> "At such conference the Company representatives emphasized that it had every intention of complying with the express provisions of the above cited finding [Condition (2) (ii)] and would comply with the same as soon as practicable after the Order became final in Docket G-2019. The Company sought to make it entirely clear that it had no quarrel with the requirements of Finding (2) (ii), and that its only area of disagreement with the Commission was as to the time when the Company should be required to take action. * * * *"

[24] As proposed, the amended order provided that Texas Eastern should "refund to its customers * * * the actual difference between the cost of gas purchased from United at Longview, Texas, and Kosciusko, Mississippi under rates effective (i) prior to August 1, 1954 and (ii) on and after August 1, 1954, for the period from August 1, 1954, to the effective date of United's rate increases in G-9547."

[25] The Commission especially emphasizes this language in the proposed Amendment:

> "By its opinion No. 277 * * * in Docket No. G-2019, the Commission ordered United to file * * * new rates for sales of gas by United to Texas Eastern at Longview, Texas, and at

There it ended until September 25, 1958 when the activities previously described commenced and which led to Texas Eastern's [a] [b] [c] compliance "settlement" of February 23, 1959.[2]

Reference to Docket G-2019 was Purposeful

While our conclusion that reference to Docket G-2019 was purposeful and did not thereby include actions taken in G-1142 and this decision is reached on the face of the document itself, we have nevertheless undertaken to set forth this great detail. We have done this because of the earnest argument made by the parties and the desirability of putting in proper context the evidence thought by the Commission to demonstrate a contrary construction of Condition 2 (iii). This historical detail also makes it possible for us to list more briefly some of the factors leading to this basic conclusion.

In arriving at this conclusion, we have borne in mind what we emphasized at the outset that this was a *contract*. Being a contract, it was important that the parties know what was being surrendered, what was being gained. This was of importance to everyone and certainly to Texas Eastern. Its proposed rates called for an increase of approximately $64 million annually. Out of the settlement, this increase was reduced to $15 million. And it was subject to further reduction by the operation of Condition 2 (iii). It

Koscusko, Mississippi, * * *. Pursuant to said Order, United filed rates * * * increasing its rate for sales of gas * * * at Longview, Texas, and decreasing its rate for sale * * * at Koscusko, Mississippi * * *." Then followed a reference to Texas Eastern's running controversy over the finality of the judgment in G-2019.

[2] See notes 19, 20 and related text.

was essential, therefore, that with the inescapable uncertainty of the time and amount of such further reductions, Texas Eastern know precisely the standard upon which they were to be determined. Here the parties supplied that standard by a sort of shorthand symbol "the final judgment in Docket G-2019."

Several things stand out to support the conclusion that reference to G-2019 was purposely limited to that proceeding only. The order of consolidation in G-1142 and G-2019 (and others) was entered November 1952.[9] Nevertheless the Commission was itself scrupulously precise in distinguishing between the proceedings. Thus its subsequent order of January 14, 1953 (note 9, supra) allowing United rates to go into effect under bond was headed "Docket G-2019" with no reference to G-1142 or to the Docket Nos. as consolidated. Likewise, in a related proceeding involving the controversy between Mississippi River and United, the parties carefully distinguished the "obligation" to file reduced rates from that of issuing or cash refunds received. The parties then spelled out the inclusion of both G-1142 and G-2019.[9] Here there were different parties and different agreements, but some parties were the same, the subject was identical and always there was the energetic staff of the Commission, whose protection of the public interest

[9] Article VII provided:

"The Company * * * in the proceedings in Commission Docket Nos. G-1142 and G-2019, or either of them, to make any reduction in the rate to be charged * * * by Mississippi * * * shall * * * [emphasis added]."

This settlement is the subject of the opinion in Mississippi River Fuel Corp. [illegible] and paragraph VII is quoted [illegible]

required, as a minimum, that it exact precision as the price of its concurrence.

The notion that reference to G-2019 casually brought any and all other dockets to which United might be a party into the scope of this indeterminable refund-rate-reduction-obligation ignores the technical, but profound, distinction between the nature of a § 4 and a § 5 proceeding. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 1956, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373; *FPC v. Sierra Pacific Power Co.*, 1956, 350 U. S. 348, 76 S. Ct. 368, 100 L. Ed. 388. Since United's conversion tariff covering Kosciusko rates did not make an increase, the parties—all of whom were represented by seasoned hands skilled in the Natural Gas Act—knew positively that the Commission in the § 4 (e) proceedings in G-2019 did not have the power, nor did they ever undertake, to alter such rates. The downward changes in that rate could come about only by the Commission § 5 (a) general investigation which, all knew equally well, had been pending since 1948 in G-1142.

The Commission certainly respected the distinction between these proceedings. In Opinion No. 277, it did not undertake to throw everything in under a single catch-all docket reference number. The docket numbers were separately listed.[11] Indeed, this was more than good procedural administrative housekeeping. It was substantively indispensable. The cases thrown into the hopper were related in many ways. But, they were also quite distinct. Consequently, no matter how the common order or opinion might be headed by a clerical docket number, it was positive that

[11] See note 10, supra.

in an operative sense, everything had to go back to the particular proceeding out of which the specific problem arose. It was this very approach that led the Commission—and properly so—to rule that, whatever the scope and meaning of it, the order of Opinion No. 277 was "final" as to Texas Eastern on November 2, 1954. As to Texas Eastern *vis-a-vis* United, it was not jeopardized or made uncertain by Mississippi River's appeal.[32]

What the Commission was required to—and did—keep distinctly separate, the parties were likewise entitled to treat both as separate and as indicating nothing more than the particular specified separate proceeding.

To demonstrate that reference to G-2019 meant something else, the Commission (and intervenors) assert several things. One is that since Kosciusko rates were included in the conversion tariff, part of which was suspended and set down for hearing in G-2019, the reference to G-2019 reflected the parties' awareness that the Kosciusko rates might be lowered. But as we have pointed out, this could not be done in G-2019. If it was to be done at all, it had to be done under § 5 (a) and that was the subject of G-1142. Next, as a sort of corollary to this, it is urged that in determining the lawfulness of the Longview (Central Zone) rates in

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[32] In the order of September 11, 1958, approving the Mississippi-United settlement, after remand (252 F. 2d 622), the Commission's purpose to keep each one of the consolidated dockets separate for substantive purposes was reflected at note 2:

"The order which the Court reviewed fixed the rate for the only customer for whom rates had not been previously fixed *in seven proceedings* relating to United's jurisdictional sales: United Gas Pipe Line Co., Opinion No. 277, Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, G-2220 and G-2378, issued November 2, 1954." (emphasis added)

G-2019, the parties knew that the Commission, viewing United's operations comprehensively, might well have to evaluate Kosciusko rate also. Whatever interrelationship there might be, the reduction would certainly not fit the words of Condition 2 (ii) that "If * * * United * * *, as a result of a final judgment in Docket No. G-2019 * * * places in effect tariffs providing for lower sales rate * * *." Of course, nothing like this took place for Opinion No. 277 reflects that the reduction in Kosciusko was by virtue of the unquestioned power of the Commission in the § 5(a) proceedings in G-1142. It did not undertake to do this by any tail-wagging process now urged.

That brings us to the most substantial argument which, stated in various ways, asserts that G-2019 must include G-1142 because any other construction imputes to the parties action which simply does not make sense. Reversing it, the Commission's brief urges that the only "common sense result" which the parties could have intended is "one in which Texas Eastern would 'pass on to its customers the full benefit of the refund and rate reductions ordered in the pending consolidated proceedings.' What underlays this argument is the further assertion that the construction advanced by Texas Eastern means that its "customers acquiesced in the distinct possibility of a future windfall to Texas Eastern." Putting it another way, it is inconceivable that "the parties would have intended to have Texas Eastern pass on any prospective reduction in United's [Longview] Zone rates but leave it free to enjoy a windfall upon United's reduction of its [Kosciusko] Zone rates." The Commission points out that Texas Eastern's proposed increases were, in turn, based on two things. First was the increased cost for gas purchased at Longview. Second, and

for a substantial amount, was the cost of gas—but not a proposed increase in the cost of such gas—to be purchased at Kosciusko at rates then currently in effect. Consequently, the Commission's brief asserts, since the Commission some five years before in 1948, had initiated a proceeding under § 5 (a) questioning the lawfulness of United's rates in all Zones "there was the distinct possibility that that proceeding would eventuate in an order for prospective reductions in the [Kosciusko] Zone." Next, the Commission argues, that whereas in the event of an *increase* in United's rates under the § 5 (a) order, Texas Eastern could protect itself by immediate § 4 filings for increased rates subject only to five months' suspension, the customers of Texas Eastern could be protected against the possibility of a rate reduction only by suitable condition in the Texas Eastern settlement. Otherwise, the argument runs, upon a reduction in United's rates (by the § 5 (a) proceedings in G-1142), the Commission could do no more than institute another § 5 (a) investigation into Texas Eastern's rates; and, after hearing, order only prospective rate reduction, "thus affording a windfall to Texas Eastern in the interim."

We think that effective arguments of equal strength could readily be marshalled against these. Thus, for example, assuming that the parties knew that in a proceeding which had been percolating since 1948, "there was a distinct possibility" that reductions in United's rates would be ordered, the parties knew equally well that that could not come about in G-2019 as such. Likewise, the specter of a windfall never materialized; in the 1958 tender made to and accepted by all of the customers save the Columbia companies, element [b], see note 19 *supra*, gives them the

full benefit of actual reductions in Kosciusko rates, even though such funds were not legally due.[33]

But we think that any such analysis, pro or con, is fundamentally erroneous. Of course, like many situations in the law, a factor, actually and finally extraneous, is brought in as a sort of a negative-tester.[34] Consequently, it is entirely appropriate that the briefs have discussed these factors. But great care must be used lest this obscure what is so basic and crucial here—we are dealing with a settlement.

The approach of the Commission is that the settlement necessarily had to provide everything—including safeguards against every unknown, but possible contingency—

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[33] As to the period from April 1, 1950 to November 10, 1957, covered in part by element [C] (see note 20, *supra*), on no stretch of the imagination can it be said that Texas Eastern has received the benefit of any "reductions" as "a result of the final judgment in Docket No. G-2010." Assuming that G-2010 incorporated § 5 (a) reductions of G-1142, they cease to be reductions received *by virtue* of such consolidated orders when and as United filed its rate increases in G-9547, and later on in G-10592. As between Texas Eastern and its customers, this was not, as the Circuit Court for the District of Columbia seemed to reason, a situation in which Texas Eastern was attempting to obtain an increase in rates without complying with the § 4 procedure. What, and all that, is involved is the construction of a settlement contract by which, in most, the customers of Texas Eastern seek to obtain the benefit of any actual lowered costs to Texas Eastern in the purchase of its gas from United. When the costs were no longer lowered, then by reason of the terms of the settlement contract there was no longer any obligation to "pass" them on. Were the matter before us for decision, we would therefore have considerable difficulty in accepting this approach and conclusion of Mississippi River Fuel Corporation v. FPC, D.C. Cir., 1960, 281 F. 2d 919.

[34] E.g., the determination of anti-union motivation for a discharge in violation of § 8 (a) (3) of the Labor Management Relations Act, 29 USCA § 158 (a) (3), NLRB v. McGahey, 5 Cir., 1956, 233 F. 2d 406, 413.

which a final order after an adversary proceeding would have included. This is not to say that the settlement agreement would never have been made unless it was legally perfect and all sufficient, and therefore it must be construed to accomplish that objective. But that is not a settlement. That is a quiescence in an adversary order under circumstances which merely abandons further procedural processes.

A settlement by its very nature is a compromise—a process by which positions, legal or factual, no matter how seriously maintained or legally supportable, are surrendered in whole or in part to achieve peace. If it is to be really a settlement, the parties will have weighed, consciously or unconsciously, the relative importance of subsidiary factors. Each party must give. How much to give is a matter for each party. Seldom will it ever be possible to determine retrospectively what the other would have done had the adversary insisted upon a different term in the compromise. It is only certain that it is not sound to test that in terms of what each "legally" had to do or had the right to expect the other to do. *Florida Trailer and Equipment Co. v. Deal*, 5 Cir., 1960, 284 F. 2d 367. Indeed, the very purpose of the settlement is to make adjudication of these intricate problems unnecessary as the Commission itself has recognized.[35]

[35] In the order of September 11, 1958, approving the Mississippi River United settlement, see note 2 *supra*, at 32, the Commission described the process:

"The sole issue now before us, then, is whether, under the circumstances presented here, we should approve the proposed settlement notwithstanding the possibility that if these matters proceeded to final conclusion (that is to say, if United's case was cross-examined, other parties presented their cases, cross-examined United presented rebuttal evidence and

Many arguments can be mustered why either one of the parties would not have agreed to this settlement were it now to receive the construction urged by the other. The simple truth is that we can never know. Texas Eastern, for example, was willing to "give up" $15 million of its proposed increases. The Commission on the other hand was willing to "give up" its legal right to contest further the increase of $27 million thus agreed to. A factor was the extent of further refunds or reductions depending on developments in one or more proceedings outside of this one. Just as there was bound to have been compromise and adjustment in the process of "giving up" $15 million and in "giving into" $27 million, there was likewise a basis for adjustment in the nature, extent and scope of such future contingent refunds or rate reductions. The parties used a symbol having a definitive precise meaning. We cannot ignore it by thinking now that it might have been a bad trade.

In view of this little need be said about the further point that conduct by Texas Eastern puts a construction on it so much at variance with its present contentions as to conclusively show the proper reading of it. Though we freely acknowledge that, here and there, words and phrases may be found in the exchange of correspondence, motions, replies and oppositions, the actual conduct of Texas Eastern is consistent with but one thing. It was insisting that opinion No.

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that cross-examined; the matters briefed, examiner's decision rendered, exceptions filed, oral argument had upon exceptions and the whole band of the administrative process, as provided for in the Act and the Administrative Procedure Act followed), we might then arrive at a determination that United should be allowed in a cost of service something like less than $14,152,326 for its purchase from Union."

277 was not final until the conclusion of the Mississippi River-United settlement. That is what they were debating in the exchange. And in none of it did Texas Eastern ever take a position showing what its liabilities under Condition 2 (ii) would be when, and as, the proper time was reached. So far as the 1955 petition to amend[46] Condition 2 (ii) and its subsequent formal withdrawal is concerned, we do not see how action proposing an amendment which was never completed and later was withdrawn can amount to anything more than another earnest effort to find a practical solution to a problem which had been plaguing all of the parties—as it still does. The proposed amendment was an effort to cure in advance the further controversy engendered because of the subsequent increases in United's rates. It was to meet a situation not existing or presumably contemplated at the time of the initial settlement agreement in G-1904. As to this we have seen that even at this late date there is, or may well be, a considerable basis for a difference of opinion. See note 35, supra. As such, it was another settlement or a settlement proposal. That brings into play all of the intrinsic countervailing factors which inhere in the process of making a compromise. Evidence of offers of compromise is ordinarily not admissible at all. And an offer to "settle a settlement" is so fraught with uncertainties that it is scarcely a reliable basis upon which to find conclusively that when G-2019 was articulately used by knowledgable parties, they nevertheless intended that "Texas Eastern should pass on to its customers the full benefit of the refund and rate reductions ordered in the pending consolidated proceedings" no matter what their docket number.

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[46] See notes 27 and 28, supra.

no matter what their date of origin, and no matter what their geographical application.

The result is that we agree with Texas Eastern that its refund and rate reduction obligations are restricted to those directly set in motion by G-2019 and that, conversely, they do not encompass the rate reductions for gas delivered at Kosciusko as a result of reductions brought about by the § 5 (a) proceedings in G-1142.

G-2019 Final in 1954

While it does not appear to have any particular significance except perhaps as to the interest element, we think the Commission is certainly correct in its decision that with respect to the United-Texas Eastern rates, opinion No. 277 became final in November 1954. To be sure, there was a controversy yet remaining as between Mississippi River and United, but these in no way related to Texas Eastern or the rates to be charged for gas sold to it by United. The objections urged by Mississippi River related to its own rates. Nothing which the Commission would do with respect to that controversy, or a court would do on appeal from it, either did, or could, have had any practical effect upon the rates previously approved in November 1954 as between United and Texas Eastern. Certainly United treated it as final by making refunds (see note 11, supra), and putting into effect the reduced rates for Kosciusko sales (see note 19, supra).

G-2019 Effective August 1, 1954

Likewise, we agree with the Commission that the obliga-

tion to make refund while imposed by the order of November 2, 1954, was properly made effective as of August 1, 1954. This was certainly a contingency within the terms of Condition 2 (ii). It provided that "such reduction * * * as a result of the final judgment in Docket No. G-2019," shall be made effective as of the date of such final judgment. It is not to be so narrowly read as to limit it to the actual day upon which the order was entered. The "effective date" is the day on which the judgment in G-2019 is to take effect. Since this Condition 2 (ii) was in a settlement made in G-1964, the parties certainly had to contemplate that G-2019 might likewise terminate in a settlement. That exposed them to the likelihood that the parties to such a settlement would stipulate, with Commission approval, to a retroactive effective date. This construction carries out, no more and no less, the purpose to assure that Texas Eastern would pass onto its customers all of the benefits from rate reductions or refunds as a result of the judgment in G-2019. If United agreed, as it did, to make the rates effective as of a prior date, then Texas Eastern, to the extent it received such refunds or reductions, agreed to pass them on to its customers.

Interest

That leaves then only the question of interest. The Commission letter order determined that "Texas Eastern's failure to make prompt refunds and rate reductions" requires the imposition of an obligation to pay interest "at 6% per annum on all refunds from the date of receipt of * * * excess amounts to the date of refund."

We find it unnecessary to discuss this at any length. In the Mississippi River-United settlement, the Court imposed

interest even though the settlement contract did not provide for it.[37] Here Texas Eastern urges that the phrase in Condition 2 (ii) requiring that refunds received from United should be distributed promptly "and without additional cost or liability to Texas Eastern" excludes the obligation to pay interest. We do not examine this closely either.

Considerable latitude must be left to the Commission as a sanction to insure prompt compliance with obligations imposed under Orders of agreed settlements. Here we think, however, that on our ultimate conclusion the matter is virtually moot. The amounts paid to all of the customers other than the Columbia companies included element [b] and [c]. These were payments of substantial amounts over and beyond that legally required under the settlement agreement since all that Texas Eastern had to refund was the cash refund received under element [a]. The payment of sums substantially in excess of the amount legally due, and greatly in excess of any interest then due, or since accrued, more than compensates those customers for the loss of the use of money rightfully due them shortly after November 1957.

So far as concerns the intervenor Columbia companies, our holding would be the same to the extent that they are now free to accept, as did all others, the tender covering elements [b] and [c]. To the extent that by their refusal to accept the tender, they have now lost the opportunity of receiving like payments for elements [b] and [c], we would consider that for refunds of element [a], the Commission

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[37] Mississippi River Fuel Corp. v. FPC, D.C. Cir., 1960, 281 F. 2d 919, at 927.

had ample basis for awarding [illegible] interest on those amounts. As the record is unclear as to this phase and calculations in any event would be required, the cause is remanded to the Commission as to this.

The result is that, except for the limited factor of interest, the letter order of the Commission is reversed, and the matter is remanded to the Commission for such further and other proceedings as are consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,046

TEXAS EASTERN TRANSMISSION CORPORATION,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

Petition for Review of Orders of the Federal Power Commission.

Before RIVES, BROWN and WISDOM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Texas Eastern Transmission Corporation for review of orders of the Federal Power Commission issued on March 13, 1961 and May 11, 1961 in Docket No. G-1964, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that, except for the limited factor of interest, the letter order of the Commission in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the Commissioner for such further and other proceedings as are consistent with the opinion of this Court.

July 19, 1962

Issued: May 8, 1963

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,046

TEXAS EASTERN TRANSMISSION CORPORATION,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

On Petition to Review an Order of the Federal Power Commission.

(April 22, 1963)

ON PETITION FOR REHEARING

Before RIVES, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

It is ORDERED THAT the Petition for Rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.